84-565

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NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

COMMONWEALTH OF MASSACHUSETTS,
Petitioner.

V.

PAUL DONOVAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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QUESTION PRESENTED

Whether a technical violation of Wade-Gilbert[1/] should require per se exclusion of identification testimony or whether the determination to exclude should be made under the totality of the circumstances test?

1/ United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

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OPINIONS BELOW

The opinion of the Supreme Judicial Court (App. A) is reported at 392 Mass. 647, 467 N.E.2d 198 (1984). The opinion of the Appeals Court (App. B) is reported at 17 Mass. App. Ct. 924; 456 N.E.2d 474 (1983).

JURISDICTION

The decision of the Court below was entered on August 7, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOKED
SIXTH AMENDMENT

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

In 1980, Paul Donovan was indicted for assault and battery with a dangerous weapon and assault with intent to murder. Prior to trial, the defendant filed a motion to suppress evidence of identifications, which was denied after hearing. (Memorandum of Decision (App. C)). A rehearing was held on the defendant's Sixth Amendment claim and denied. (Supplemental Findings of Fact, Rulings of Law and Memorandum of Decision (App. D)).

The defendant, after trial by jury, was found guilty of assault and battery with a dangerous weapon.

The conviction was affirmed by the Massachusetts Appeals Court on November

22, 1983. (App. B). The defendant filed an application for further appellate review in the Supreme Judicial Court which was allowed on January 5, 1984. After argument the Supreme Judicial Court reversed the conviction. (App. A).

A motion to stay issuance of the rescript pending application to this Court for a writ of certiorari was allowed on August 22, 1984.

STATEMENT OF FACTS

On March 23, 1980, the victim, accompanied by Pablo Jaime was stabbed by the defendant during an apparent argument with another man. The attack was also witnessed by one Reuben Fernandez who observed the events from

his living room window and later identified the defendant as the man who did the stabbing.[2/]

The facts surrounding the identification of the defendant by Pablo Jaime as elicited at the hearings on the motion to suppress are as follows: Jaime testified that he had been standing in the street with the victim, Julio Vargas, when a man came up to Vargas with a knife in his hand and pushed him twice. The man then got into the passenger side of a blue car, and the car sped off. He testified that he got the registration number of the car and that he could recognize the assailant. As to the courthouse

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2/ The identification of the defendant by Reuban Fernandez is not at issue.

identification, Jaime testified that he first saw the defendant in the corridor outside the courtroom and then in the courtroom. Officer Fournier testified that he arrived at the courthouse, went into the courtroom, saw the defendant and Jaime in the courtroom and asked Jaime to step outside; he then asked Jaime if he had seen anyone in the courtroom whom he had seen on March 23, 1980. He testified that Jaime said "yes" and that they returned to the courtroom and he asked Jaime "Where is he" and Jaime pointed to the defendant sitting among the spectators. Fournier further testified that he knew that counsel had been previously appointed for the defendant at arraignment and that did not tell the attorney of Jaime's identification.

The trial court in denying the Motion to Suppress found:

> "Although adversary proceedings had commenced against the defendant, he had been arrested and was in Court for a scheduled probable cause hearing, the identification procedure, if considered to be such, was not pre-arranged by Fournier, ... even if defendant's counsel was present when Jaime identified the defendant in the courtroom, I fail to see what protection his presence would have afforded the defendant. Fournier did not act improperly nor did he impermissibly suggest to Jaime the defendants identification when he saw both in the courtroom on May 2, 1980. Nothing was done to give rise to a very substantial likelihood of irreparable misidentification by Jaime." (Supplemental Findings App. D).

The Appeals Court affirmed. (App. B). The Supreme Judicial Court relying solely upon the principles stated by this court in Moore v. Illinois, 434 U.S. 220 (1977), amplifying Gilbert v. California, 388 U.S. 263, 272-274 (1967) and United States v. Wade, 388 U.S. 218, 226-227 (1967) held that "a per se exclusionary rule requires such an identification be suppressed. Commonwealth v. Donovan, 392 Mass. at 648. (App. A).

REASONS FOR GRANTING THE WRIT

1. Per se exclusion of a pre-trial, corporeal identification made in the presence of police but without notice to counsel, notwithstanding the fairness of the identification procedure and the absence of prejudice to the defendant,

is inconsistent with this Court's recent examination and relaxation of per se application of the exclusionary rule in the Fourth Amendment context. United States v. Leon, ___ U.S. ___, 104 S.Ct. 3405 (1984); Massachusetts v. Sheppard, ___ U.S. ___, 104 S.Ct. 3424 (1984).

2. Per se exclusion of a pre-trial, corporeal identification made in the presence of police but without notice to counsel notwithstanding the fairness of the identification procedure and the absence of prejudice to the defendant, is inconsistent with the totality of the circumstances standard which informs the determination to exclude identification testimony in other identification cases. Manson v. Brathwaite, 432 U.S.

98 (1977). Kirby v. Illinois, 406 U.S. 682 (1972).

ARGUMENT

I. PER SE EXCLUSION IS AN UNNECESSARILY INFLEXIBLE AND COSTLY MEANS OF ENFORCING THE SIXTH AMENDMENT RIGHT TO COUNSEL AT PRE-TRIAL IDENTIFICATIONS.

The Sixth Amendment right to counsel at pre-trial identification sessions is designed to protect defendants from suggestiveness or other prejudicial acts that might otherwise take place. See Moore v. Illinois, 434 U.S. 220 (1977). In United States v. Wade, 388 U.S. 218 and Gilbert v. California, 388 U.S. 263 (1967), the court held

> that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the

> criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth [and Fourteenth Amendment] right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup."

Gilbert v. California, supra, at 272.

If the "source" of an in court identification is a lineup conducted in violation of this standard, the identification is inadmissable

> "Only a per se exclusionary rule as to such testimony can be an effective sanction to ensure that enforcement authorities will respect the accused's constitutional right to the presence of counsel at the critical lineup."

Id. at 273.

The prime purpose of the rule is not to vindicate the constitutional right to counsel as such but to ensure the accuracy and reliablity in pre-trial identifications. The rule is akin to the rule established in Escobedo v. Illinois, 378 U.S. 478 (1964) whose analoguous purpose has been described as not vindicating the right to counsel as such, but "to guarantee full effectuation of the privilege against self-incrimination ... Johnson v. New Jersey, 384 U.S. 719, 729." Kirby v. Illinois, 406 U.S. 682, 689 (1972) (declining to extend the Wade-Gilbert per se exclusionary rule to identifications testimony based on pre-indictment show-up). Given the prophylactic purpose of the Escobedo

rule it is therefore appropriate to examine the voluntariness of confession under a totality of the circumstances test. Similarly, it is therefor suggested that the Wade-Gilbert rule should, consistent with this Court's decisions in recent cases dealing with prophylactic exclusionary rules in the Fourth Amendment context (see Leon and Sheppard, supra[3/]), be re-examined and re-evaluated in light of the competing values and benefits to be derived from

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3/ In Leon and Sheppard, the court acknowledged that the exclusionary rule was not mandated by the Fourth Amendment and was a "judicially created" rule designed to safeguard Fourth Amendment rights. Modification of the rule to permit admission of evidence seized in objective and reasonable reliance on a warrant, albeit later determined to be defective, was held not to jeopardize its ability to perform its intended function. Leon, 104 S. Ct. 3412.

suppression. It is suggested that by application of the "totality of the circumstance" standard an appropriate constitutional balance between the right of a defendant to be protected from prejudicial procedures and the right of the public to have criminal cases decided upon the basis of all relevant, probative and credible evidence will be obtained.

In the instant case the inequity of inflexible application of a rule of exclusion in manifest. Official involvement was minimal and occurred only after the witness' intitial confrontation with and recognition of the defendant in the corridor outside the courtroom; there was nothing suggestive in the officers question, to

the effect, had the witness seen anyone involved in the assault, the officer had nothing to do with the defendant's placement in the courtroom and there was nothing suggestive in the circumstance of the identification - the defendant was seated in the spectator section of the courtroom. Finally, as found by the trial court, although counsel had not been notified of the unplanned confrontation, there would have been nothing he could have done to ensure any additional accuracy or reliability of the identification. (Supplemental Findings, App. D.) This is a case in

which equity requires a balancing test[4/] - to evaluate all of the circumstances in a commonsense practical manner to determine "whether potential substantial prejudice to the defendant's rights inheres in the particular confrontation and [on] the ability of counsel to help avoid that prejudice". United States v. Wade, 388 U.S. 218, 227 (1967). Such an approach would reasonably consider what, if any, harm resulted from counsel's absence before reflexively requiring exclusion. See United States v. Hensel, 699 F.2d 18, 41 (1983).

4/ Substitution of a balancing under these circumstances would be consistent with the court's recent abandonment of the rigid two-prong Aquilar - Spinelli test for determining probable cause and the substitution of a "totality of the circumstances" approach. Gates v. Illinois, 462 U.S. ___, 103 S.Ct. 2317 (1983), Massachusetts v. Upton, ___ U.S.___, 104 S.Ct. 2085 (1984).

II. THE TOTALITY OF THE CIRCUMSTANCES TEST IS A CONSTITUTIONALLY ADEQUATE STANDARD FOR JUDGING THE RELIABILITY OF PRE-TRIAL IDENTIFICATION.

In rejecting the per se exclusion of pre-trial identification evidence obtained by suggestive and unnecessary police procedure in Manson v. Brathwaite, 432 U.S. 98 (1976), the court analyzed the per se rule and the totality of the circumstances approach and isolated three critical factors underlying each approach.

First, the court determined that both approaches are responsive to the concern that the jury not hear identification testimony unless that evidence has aspects of reliability.

However, the court determined:

> "The per se rule, however, goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant." Manson at 112.

Second, the court noted that both approaches would accomplish the purpose of deterring police misconduct. Id. However, in considering the third factor: the effect on the administration of justice, the per se approach "suffers serious drawbacks" in that it may make error by the trial judge more likely and where error is made in the admission of identification evidence in which the identification is indeed reliable, "reversal is a Draconian Sanction". Id., at 112-113.

The additional consideration in the instant case - the right to counsel so as to protect the defendant from suggestiveness or other prejudicial acts, can as well be protected by the totality of the circumstances approach which would take into account what if any harm resulted from counsel's absence at the identification process.[5/] It is therefore suggested that the totality of the circumstances approach is well-suited to protect both the constitutional rights of a defendant and the public interest in providing a jury with reliable and relevant evidence. It does denigrate defendants' right to

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5/ Counsel retains the ability to cross-examine the identifying witness and develop any factors concerning suggestiveness or unreliability.

counsel at a critical stage of the criminal proceeding but merely gives recognition to the fact that under certain circumstances, presence of counsel would have no effect on the reliability or fairness of the process.

Finally, rejection of a per se rule would render consistent the courts application of exclusionary rules in the Fourth context as well as render consistent application of exclusionary rules in the identification context protected by the Due Process Clause requirement of fairness.

CONCLUSION

For the reasons stated above, the court should grant certiorari and re-evaluate the applicability of the *per se* exclusionary rule for *Wade-Gilbert* violations.

Respectfully submitted,

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APPENDIX A

392 Mass. 647
467 N.E.2d 198 (1984)
392 Mass. 647 (1984)

COMMONWEALTH vs.
PAUL DONOVAN

WILKINS, J. We granted the defendant's application for further appellate review, following the decision of the Appeals Court affirming his conviction of assault and battery by means of a dangerous weapon. Commonwealth v. Donovan, 17 Mass. App. Ct. 924 (1983). The defendant asks us to consider a single question: whether his Sixth Amendment right to counsel was violated by the admission in evidence of a pretrial corporeal identification made by a witness in the presence of and at the request of a police officer and

without notice to counsel.[1/] We conclude that, under principles stated in Moore v. Illinois, 434 U.S. 220 (1977), amplifying Gilbert v. California, 388 U.S. 263, 272-274 (1967), and United States v. Wade, 388 U.S. 218, 226-227, 236-238 (1967), a per se exclusionary rule requires that such an identification be suppressed. Because we further conclude that the admission of this evidence was not harmless beyond a reasonable doubt, we reverse the defendant's conviction and remand the case for a new trial, before which a determination should be made whether the witness's in-court identification will be admissible

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1/ The defendant expressly disclaimed seeking review as to other issues argued before the Appeals Court. He has made no State constitutional claim.

because it would not be tainted by the improper pretrial identification.

The charge against the defendant arose out of a stabbing that occurred in Lawrence in March, 1980. Two witnesses to the crime identified the defendant as the assailant. One of these witnesses was Pablo Jaime, who identified the defendant at trial and also testified that on May 2, 1980, he had made a pretrial identification of the defendant at the Lawrence District Court.

On May 2, 1980, the day of the defendant's probable cause hearing, the defendant was seated in a courtroom waiting for the session to begin. At the defendant's arraignment on April 22, 1980, counsel had been appointed to represent him. Jaime had been summoned to the probable cause hearing and was

also in the courtroom. Without advising the defendant's counsel, the investigating police officer asked Jaime to step outside and, when he did, the officer asked Jaime if he had seen the assailant in the courtroom. Jaime said he had, and, at the officer's request, reentered the courtroom and pointed out the defendant among spectators. At trial Jaime testified to this identification. The investigating officer also testified at the trial to Jaime's identification of the defendant in the courtroom on May 2, 1980.

In considering the defendant's argument that his right to counsel under the Sixth Amendment to the Constitution of the United States was violated, it is important to set to one side cases in which it has been claimed that

particular in-court identifications, not directly initiated by the government, denied defendants their right to due process of law. Such cases, involving evidence of identifications made at the time of probable cause hearings, require attention to the circumstances of any identification, the fairness or unfairness of the procedures followed, and the extent to which counsel undertook or could have undertaken to eliminate the suggestiveness of any identification. See Commonwealth v. Cincotta, 379 Mass. 391, 394-395 (1979); Commonwealth v. Napolitano, 378 Mass. 599, 603-605 (1979); Commonwealth v. Jones, 375 Mass. 349, 358-359 (1978).

The Sixth Amendment issue calls for a separate inquiry. See Commonwealth v. Simmonds, 386 Mass. 234, 237-240 (1982),

in which we considered separately Sixth Amendment and due process challenges to the admission of evidence of pretrial identifications. Here we are concerned with a rule that requires the per se exclusion of evidence of a pretrial, corporeal identification made at the request of and in the presence of a police officer without notice to counsel. Even if the identification procedures are fair and without prejudice to the accused, and even if counsel has been appointed, evidence of such an identification must be excluded. See Gilbert v. California, supra at 273. The Supreme Court has said that because "the exclusionary rules set forth in Wade and Gilbert are justified by the need to assure the integrity and reliability of our system

of justice, they undoubtedly will affect cases in which no unfairness will be present." Stovall v. Denno, 388 U.S. 293, 299 (1967). That Court's opinion in Moore v. Illinois, supra at 229, made clear that the principles of the Wade and Gilbert cases, which involved lineups, applied as well to government requested identifications made in the course of pretrial court proceedings in the absence of counsel or without notice to counsel.

Even before the Moore case was decided, courts had recognized that a per se exclusionary rule applied to an uncounseled identification made at the time of a pretrial hearing where the identification was initiated by a police officer or a prosecutor. See United States v. Roth, 430 F.2d 1137, 1140-1141

(2d Cir. 1970), cert. denied, 400 U.S. 1021 (1971) (informal post-indictment identification made at the request of the prosecutor without notice to counsel violated Sixth Amendment rights, but the court concluded in effect that the error was harmless because the incident did not taint the witness's in-court testimony or infect the trial); Mason v. United States, 414 F.2d 1176, 1181 n.23 (D.C. Cir. 1969) (no prejudice need be shown); Martin v. Donnelly, 391 F. Supp. 1241, 1248 (D. Mass. 1974) (lack of suggestiveness "cannot excuse or validate improper police procedure"). Since the Moore case was decided, other courts have recognized that it laid down a per se exclusionary rule. See McKinon v. Wainwright, 705 F.2d 419, 422 (11th Cir.), cert. denied, 104 S.Ct. 247

(1983) (the defendant had "an absolute right to be represented by counsel at a corporeal identification held at a preliminary hearing" but here only an identification at trial was admitted in evidence and it was "based on a source independent of the identification at the preliminary hearing" because the witness had known the defendant long before the crime was committed); Solomon v. Smith, 645 F.2d 1179, 1187-1188 & n.8 (2d Cir. 1981) (witness may not identify defendant at trial following an identification in a showup in the absence of counsel at a crucial stage of the proceedings, unless the witness's ability to identify the defendant has an origin "independent" of the uncounseled identification proceeding). Cf. United States v. Hensel, 699 F.2d 18, 40-41

(1st Cir.), cert. denied, 103 S. Ct. 2431; sub nom. Dill v. United States, 104 S. Ct. 91; sub nom. Case v. United States, 104 S. Ct. 94 (1983) (identification made during a chance encounter at a snack bar after the prosecutor asked the witness to "look around" the courthouse to see if he could identify the persons who committed the crime, admissible); Commonwealth v. Cincotta, 379 Mass. 391, 393, 395 n.8 (1979) (identification spontaneously offered by witnesses seated at probable cause hearing, admissible). That the rule of the Moore case applies without regard to the suggestiveness or unfairness of the identification procedures and is a per se exclusionary rule is confirmed by the comments of Justice Rehnquist, concurring in the

Moore case. Moore v. Illinois, supra at 232-233 (Rehnquist, J., concurring). Because of the absence of notice to counsel in such a situation, a defendant has no opportunity to prevent or control such a "showup" or to arrange alternatively for a lineup prior to the hearing.

The Commonwealth argues that, if there was a Sixth Amendment violation, it was harmless beyond a reasonable doubt. See Moore v. Illinois, supra at 232. Because Jaime's testimony and the police officer's testimony concerning Jaime's pretrial identification at the officer's request were admissible for probative purposes (see Commonwealth v. Weichell, 390 Mass. 62, 71 [1983], cert. denied, 104 S. Ct. 1298 [1984]), and Jaime was one of only two witnesses who

identified the defendant, we cannot fairly say that admission of this identification evidence was harmless beyond a reasonable doubt.

The verdict of guilty is set aside and the judgment is reversed. The order denying the motion to suppress the pretrial identification is vacated and an order shall be entered suppressing that identification. Before any retrial at which Jaime will testify and identify the defendant as the assailant, there must be a hearing to determine whether there is an adequate basis for Jaime to identify the defendant at trial (and for the admission of any pretrial identification other than the one made by Jaime at the request of the investigating officer).

So Ordered.

APPENDIX B

17 Mass. App. Ct. 901 at 924

COMMONWEALTH vs.
PAUL DONOVAN

November 22, 1983.

The defendant appeals from his conviction on an indictment charging assault and battery by means of a dangerous weapon.[1/] Although the defendant claims that there were prejudicial errors during the course of his trial, the most substantial issues on appeal relate to the defendant's claim that the denial of his several motions to suppress pretrial corporeal identifications violated his right to due process and his Sixth Amendment rights.

1/ The defendant was found not guilty on a charge of assault with intent to murder.

None of the questions raised on appeal has merit, and only a brief discussion of each is warranted. We thus treat the claims seriatim, pausing only long enough to elaborate on the defendant's claim that the reasoning of Moore v. Illinois, 434 U.S. 220 (1977), required suppression of the identification made of him on the occasion of the probable cause hearing.

1. The judge denied the defendant's motion to suppress an out-of-court identification of the defendant made at a one-on-one confrontation. See Commonwealth v. Moon, 380 Mass. 751, 758-759 (1980), and cases cited. At the Lawrence police station two days after the criminal event in question, the defendant was subjected to a one-on-one confrontation with one Ruben Fernandez,

a person who had observed the assault from the window of his second floor apartment. Of course, one-on-one confrontations are "constitutionally suspect" (Commonwealth v. Torres, 367 Mass. 737, 740 [1975]), but, here, the judge after making an appropriate analysis of the "totality of the circumstances" of the identification (See Commonwealth v. Botelho, 369 Mass. 860, 867 [1976]), concluded that the station house identification was not improper. See Commonwealth v. Toney, 385 Mass. 575, 586 (1982). He found that the identification was neither planned nor contrived. The judge's conclusion was warranted by the evidence and supported by his subsidiary findings. See Commonwealth v. Moon, 380 Mass. at 756, and cases cited. See also

Commonwealth v. Clifford, 374 Mass. 293, 304 (1978) (careful findings supported by the evidence are not likely to be disturbed).

Officer Fournier, the investigating officer, had no prior knowledge of or contact with the defendant and did not anticipate that the defendant would accompany a suspect, one Vignola, to the station house. Upon receiving notice that Vignola was waiting at the station for him, Fournier went to the witness' home and drove the witness to the station. The officer had a description of the defendant but did not know his identity. The witness viewed each man separately, identifying Vignola as being present at the stabbing but not the defendant. It is apparent that Fournier looked upon the fortuitous appearance of

the defendant at the station house as an opportunity to further his ongoing investigation of the incident. Cf. Commonwealth v. Barnett, 371 Mass. 87, 92 (1976), cert. denied, 429 U.S. 1049 (1977). In the circumstances, such conduct was not improper, as "there were no such 'special elements of unfairness' [citation omitted] as might take the case out of the general class permitting a confrontation without lineup." Commonwealth v. Barnett, 371 Mass. at 93. See Commonwealth v. Bowden, 379 Mass. 472, 479 (1980). Compare Commonwealth v. Powell, 10 Mass. App. Ct. 57, 60-61 (1980), with Commonwealth v. Coy, 10 Mass. App. Ct. 367, 371-372 (1980). (The record shows that the witness did in fact recognize the defendant but did not identify him

because "he did not want to get involved." See part 3, infra.)

Based on what we have already said, it is not necessary to discuss whether the Commonwealth has shown by clear and convincing evidence that the proffered identification of the defendant by Fernandez at the station house stemmed from an independent source. Commonwealth v. Botelho, 369 Mass. at 867-868.

2. Counsel for the defendant was appointed at the arraignment on April 22, 1980. On May 2, 1980, the day of the probable cause hearing, the defendant was seated in the Lawrence District Court waiting for the session to begin. Pablo Jaime, a witness to the assault, had been summoned to the probable cause hearing and was also in

the courtroom. Officer Fournier entered the courtroom and, upon seeing both the defendant and Jaime, asked Jaime to step outside. The officer then asked Jaime if he had seen anyone in the courtroom who had been present at the assault. Jaime replied that he had, and then, at Fournier's request, he reentered the courtroom and pointed out the defendant seated amid the audience.

The judge correctly denied the defendant's motion to suppress this identification of the defendant made just prior to the probable cause hearing. The defendant argues that because the arresting officer caused this identification to be made at a time when he was without counsel and adversary proceedings had clearly commenced, the defendant's Sixth

Amendment right to counsel was violated. See Moore v. Illinois, 434 U.S. at 231-232. The defendant asserts that in these circumstances we should invoke the "Wade-Gilbert per se exclusionary rule." Kirby v. Illinois, 406 U.S. 682, 684 (1972). The defendant's claim is wide of the mark. This aspect of the case is controlled by Commonwealth v. Napolitano, 378 Mass. 599, 604 (1979). Unlike Moore, the record here shows that the defendant had been assigned counsel at the time of the probable cause hearing. Compare Commonwealth v. Jones, 375 Mass. 349, 358 (1978). The defendant's counsel was aware of the type of proceeding, and it was his "responsibility to be alert and, as far as he thinks necessary or useful, to try to eliminate any suggestive

influence." Commonwealth v. Cincotta, 379 Mass. 391, 395 (1979). Moreover, unlike the situation in Cincotta, the defendant was seated among the spectators in the courtroom at the time he was identified by the witness. We see nothing unfair or impermissibly suggestive here. Compare Commonwealth v. Jones, 375 Mass. at 357-359. Nor has the defendant established a prearranged scheme designed to identify him or shown any other improper conduct.

3. The question whether the judge properly could admit testimony of Officer Fournier relating the explanation given by a witness as to why he had delayed identifying the defendant has been answered adversely to the defendant in Commonwealth v. Breese, 381 Mass. 13, 17 (1980). See also

Commonwealth v. Lacy, 371 Mass. 363, 368-369 (1976); See also Commonwealth v. Sheeran, 370 Mass. 82, 87 (1976). These statements were relevant to the witness's state of mind and the reasons for his delay in making an identification. See Commonwealth v. Dougan, 377 Mass. 303, 309-309 (1979).

4. Viewing the charge in its entirety, we conclude that the inclusion of the disfavored Madeiros warning (see Commonwealth v. Madeiros, 225 Mass. 304, 307 [1926]) was not in this instance such error as should call for reversal of the judgment. Notwithstanding the defendant's objection to the Madeiros language, we still must review the entire charge because "the adequacy of instructions must be determined in light of their over-all impact on the jury."

Commonwealth v. Sellon, 380 Mass. 220, 231-232 (1980). See Commonwealth v. Ramey, 368 Mass. 109, 114 (1975). The substance of the instant charge closely resembles the charge approved by the Supreme Judicial Court in Commonwealth v. Williams, 378 Mass. 217, 233-235 (1979). See also Commonwealth v. Tavares, 385 Mass. 140, 147-149 (1982). Apart from the fifteen or sixteen times the judge mentioned that the proof required to convict must be beyond a reasonable doubt, he, as did the trial judge in Williams, quoted the entire passage from Madeiros, as well as the preferred - proved to a "moral certainty" - language of Commonwealth v. Webster, 5 Cush. 295, 320 (1850). See Commonwealth v. Carballo, 381 Mass. 227, 229 (1980). We think that this

eliminated any possible misapplication of the law. Commonwealth v. Powers, 9 Mass. App. Ct. 771, 772 (1980).

5. The defendant claims that the judge's instruction on identification based on the model suggested by Commonwealth v. Rodriguez, 378 Mass. 296, 310-311 (1979), "contained a fundamental flaw prejudicial" to him. We disagree. At one point in the charge the judge substituted the word "defendant" for "perpetrator." When the charge is read as a whole (see Commonwealth v. Gibson, 368 Mass. 518, 527-528 [1975]), we are unable to conclude that this apparent slip of the tongue caused any prejudicial error. See, e.g., Commonwealth v. Howell, 386 Mass. 738, 740 (1982). By placing emphasis on the necessity of moral

certainty of guilt, ibid., and by including the statement that "the burden of proof includes proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime" in the instructions, we think that the judge corrected any potential prejudice. See and compare Commonwealth v. Lutz, 9 Mass. App. Ct. 357, 361-362 (1980).

Judgment affirmed.

Brownlow M. Speer for the defendant.

Sharon D. Meyers, Assistant District Attorney, for the Commonwealth.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
DEPARTMENT
INDICTMENT NOS:
01555 and 01556

COMMONWEALTH)
)
VS.)
)
PAUL DONOVAN)

FINDINGS OF FACT, RULINGS OF LAW AND MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO SUPPRESS

The defendant contends that his pre-trial identification as the assailant of Julio Vargas, who suffered serious stab wounds on March 23, 1980, should be suppressed on the ground that it was improperly suggestive and unreliable and therefore constitutionally infirm and further that

his in-court identification on July 22, and 23, 1980 was not based on observations independent of the alleged improper pre-trial identification procedure.

The Court makes the following findings of fact and rulings of law in denying the defendant's Motion to Suppress in ruling that the station house identification of the defendant by Ruben Fernandez on March 25, 1980 was not conducted in any impermissibly suggestive fashion giving rise to a very substantial likelihood of mistaken identification, nor was the identification of the defendant by Pablo Jaime on May 2, 1980 at the Lawrence District Court or the defendant's in-court identification by Fernandez and Jaime at the probable cause hearing on

July 22 and 23, 1980, which the Court finds was adequately based on observations of the defendant by Fernandez and Jaime at the time of the offense and therefore the product of their own independent memory untainted by the influence of any alleged impermissibly suggestive showup. Commonwealth v. Venios, 1979 Mass. Adv. Sh. 1184, 1187. The defendant argues that the use of the so-called "one-on-one" showup by the police on March 25, 1980 was improper where no exigent circumstances existed so as to excuse or otherwise justify the failure to employ an available lineup facility. Commonwealth v. Storey, 1979 Mass. Adv. Sh. 1546.

While often disfavored, "one-on-one" confrontations, whether it be

photographic or in person, are not subject to a rule of per se exclusion. Commonwealth v. Venios, 1979 Mass. Adv. Sh. 1184.

Although such confrontations pose particularly serious dangers of suggestiveness, it would be ill advised to exclude as constitutionally unacceptable all evidence that has been derived from single person confrontations simply because the identification procedure might have taken place just as easily in the form of a lineup. See Commonwealth v. Chase, 372 Mass. 736, and Commonwealth v. Bumpus, 354 Mass. 494.

Rather, the test to be applied in measuring the constitutional sufficiency of "one-on-one" confrontations under the due process clause is simply whether the

confrontation is unnecessarily suggestive of the defendant. Commonwealth v. Venios, 1979 Mass. Adv. Sh. 1187-1188, Commonwealth v. Dougan, 1979 Mass. Adv. Sh. 380, 396.

Although Ruben Fernandez testified that he recognized the defendant at the Lawrence Police Station in the early morning hours of March 25, 1980 as the man who stabbed Julio Vargas, he failed to identify him at that time because "he did not want to get further involved" although on April 16, 1980 he identified the defendant as the assailant at a meeting held in the Lawrence District Court attended by his mother, two police officers and Robert Dumond, Director of th Victim-Assistance Program.

Subsequent to March 25, 1980, Robert Dumond was contacted by Officer Daniel

N. Fournier of the Lawrence Police Department, who had interviewed Ruben Fernandez shortly after the stabbing of Vargas on March 23, 1980, for the purpose of interviewing and to otherwise provide support to a reluctant and/or intimidated witness to a stabbing. Mr. Dumond testified that Officer Fournier had related to him the facts of the incident which occurred on March 23rd and that Fernandez had been cooperative in the investigation, but that the extent of his knowledge or cooperation was not made known to him at the initial call, other than the fact that he was advised that Fernandez became less cooperative and failed to identify the defendant on March 25th because he did not want to get further involved. Dumond further testified that on March

30, 1980, after calling Ruben's mother, he visited her at 138 South Union Street, Lawrence in the company of two plain-clothes detectives. He apprised her of the seriousness of the matter and explained to her that he was there to explain the Victim-Witness Assistance Program and to assist her son in testifying. The meeting lasted approximately 30 minutes. A subsequent phone call to her by Mr. Dumond resulted in a meeting being scheduled in the late afternoon on April 16, 1980 at his office at the Lawrence District Court. In attendance were two police officers, Ruben Fernandez and his mother. Upon being asked what he had observed, Ruben said he could identify the person he saw who stabbed Julio Vargas on March 23rd and that it was the same person he had

observed on March 25, 1980 at the Lawrence Police Station but that he failed to say that he recognized him at that time. The meeting lasted approximately 40 minutes, most of which was consumed by the police questioning Ruben Fernandez.

On April 19th complaints issued and the defendant was arrested on April 22, 1980. Although a formal lineup procedure was conducted that day, in which the defendant participated, only the victim, Julio Vargas, viewed the lineup. He was unable to identify the defendant as his assailant nor was he able to do so at the probable cause hearing in July in the Lawrence District Court. Since the victim has never been able to identify the defendant as his assailant, his counsel has agreed to

waive that part of his motion to suppress applicable to Julio Vargas.

Although the defendant contends that the conduct and course of action followed by Mr. Dumond tainted the identification of the defendant by Fernandez, the Court is of the opinion and so finds that Mr. Dumond in no way suggested that the defendant was suspected of the crime or exerted pressure on Fernandez to identify the defendant as there is no hint in the record that the "in-person" confrontation between Fernandez and the defendant on March 25th was improperly suggestive. In addition, Fernandez testified that "I changed my mind myself. What Dumond said has no effect on my decision." See Commonwealth v. Storey, 1979 Mass. Adv. Sh. at 1554.

At most, Dumond convinced Fernandez and his mother that he should become involved and if in fact he could identify the defendant as Vargas' assailant, he should make it known to the police.

Fernandez testified that at approximately 1:30 a.m. on March 23, 1980, on hearing some voices from the street, he looked out of his living room window at 138 South Union Street and saw Julio Vargas arguing with a man who he had seen on prior occasions going into Charlie's Bar. The man was about 6 feet tall and bald. Vargas' car was double parked and a dark blue automobile with two white lines on it was parked behind his car. Vargas was standing by the blue car when a man came running towards him and gave him what he described as

two quick pushes. He said that he did not know where the man came from but that it was not the same person arguing with Vargas. He said that he saw this man with a knife in his hand when he pushed Vargas. He further testified that he saw Pablo Jaime standing at the rear of Vargas' car and then assisting Vargas, who was bleeding, to his car, that the man with whom Vargas was arguing got into the driver's side of the blue car and the man who pushed Vargas got into the passenger side. He said that the area was well lighted and that he had a clear and unobstructed view of the incident. He further testified that he described to the police the white male who stabbed Vargas as being shorter than the man with whom he was arguing, having brown wavy hair

and a mustache and approximately 5'10" in height. This same description was repeated by Officer Fournier on the stand when inquired of as to the description given to him by Fernandez at the scene as the man who had stabbed Vargas.

The Court is of the opinion and so finds that Fernandez's recognizing of the defendant on March 25th and his acknowledgement of that fact on April 16th had a source independent of any suggestiveness by Dumond and the Lawrence Police. Also his reluctance in identifying the defendant on March 25th has been explained to the satisfaction of the Court.

In its totality, the procedure used by the police was fair. The brief lapse of time between the incident and the

confrontation, the pre-confrontation description given by Fernandez and the police procedure during the showup itself, all complied with due process standards.

As to Pablo Jaime, he testified that he witnessed the stabbing of Julio Vargas while standing close to him in the street near 138 South Union Street at approximately 1:30 a.m. on March 23, 1980. He further testified that he saw a man come up to Vargas with a knife in his hand and push him twice at which time he yelled to him not to push him; that he saw the man with the knife get into the passenger side of the blue car parked at the reat of Vargas' car and while he was holding on to Vargas who was bleeding, the blue car sped off. He testified that he was able to get the

registration of the blue car and that he could recognize Vargas' assailant.

On May 2, 1980, the defendant appeared at the Lawrence District Court. Officer Fournier testified that Jaime was also present. Jaime testified that he first saw the defendant, who was not in custody, in the corridor. Upon being asked by Fourner if he could recognize the person who stabbed Vargas, Jaime said that he could and then went inside the courtroom, that he did not sit next to the defendant who was sitting among the spectators, but again recognized the defendant and so told Fournier when Jaime returned to the corridor. Both Fournier and Jaime testified that at no time were they in the courtroom together on May 2, 1980 when Jaime recognized the defendant as Vargas' assailant.

In Commonwealth v. Mattias, 397 N.E.2d 1134 (Appeals Court), it was held that a chance encounter by a victim who saw the defendant on the street two days after the crime did not raise any due process problems.

In Commonwealth v. Cincotta, 398 N.E.2d 478, an in-person identification made by the eyewitnesses while both the witnesses and the defendant were waiting outside the courtroom on the day of a heaaing contained only a minor element of suggestiveness, not sufficient to overturn the identification. There the Court observed that the meeting was not calculated. In accord is Commonwealth v. Sheffield, 407 N.E.2d 1324 (Appeals Court, where there was an unplanned identification of a defendant in a waiting line at the Municipal Court.

Further evidence at the hearing indicated that the defendant was identified at the probable cause hearing in Lawrence on July 22 and 23, 1980 by Ruben Fernandez and Pablo Jaime.

Based upon its findings of fact, rulings of law and analysis of the evidence presented, the defendant's Motion to Suppress is DENIED.

By the Court

_____
Herbert Abrams
Justice of the
Superior Court

Dated: March 10, 1981

Entered:

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. SUPERIOR COURT
INDICTMENT NOS:
01555 and 01556

COMMONWEALTH)
)
vs.)
)
PAUL DONOVAN)

SUPPLEMENTAL FINDINGS OF FACT, RULINGS OF LAW AND MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO SUPPRESS

Subsequent to the Court's denial on March 10, 1981 of defendant's Motion to Suppress, the defendant filed on March 13, 1981 a motion for a re-hearing on so much of his motion to suppress as it relates to his identification in the Lawrence District Court on May 2, 1980 by Pablo F. Jaime.

On March 17, 1981, the Court allowed the said motion and on that date heard Officer Fournier testify as follows: that on May 2, 1980, he knew that Attorney Fusco was counsel for the defendant, having been appointed by the Court after his arrest on April 22, 1980; that he was present at the defendant's arraignment and that the police report given to Fusco did not contain the description of the person who had assaulted Vargas as given to him by Pablo Jaime. He further testified that he saw the defendant on May 2, 1980 in the courtroom of the Lawrence District Court shortly after he arrived at 9 a.m., that he also saw Jaime in the courtroom and asked him to step outside; that he asked Jaime if anyone in the courtroom looked familiar, i.e., did he

see anyone in the courtroom who he saw on March 23, 1980? He testified that Jaime said "Yes." Fournier said that he wanted to assure himself that Jaime could identify the defendant' that on returning to the courtroom, Jaime pointed out the defendant sitting among the spectators by distinguishing his dress when asked, "Where is he?" Fournier further testified that he did not tell Fusco of Jaime's identification.

The defendant contends that Martin v. Donnelly, 391 F. Supp. 1241 (1974) governs in that U.S. v. Wade, 388 U.S. 218 (1967) held that not only is counsel required at the "critical stage" of a criminal proceeding, the prosecution is required to notify counsel of the impending line-up. Gilbert v. California, 388 U.S. 263, decided the

same day, held that the requirement referred to in Wade is applicable to state criminal proceedings. It can be agreed that once formal adversarial criminal proceedings are commenced, the "critical stage" has been reached. U.S. v. Ash, 413 U.S. 300 (1973).

Here there was no line-up nor can I find that the identification proceedings were conducted by Officer Fournier in secret (see Martin v. Donnelly at page 1247). The issue in U.S. v. Wade, supra was whether potential substantial prejudice to the defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

Although adversary judicial proceedings had commenced against the defendant, he had been arrested and was

in Court for a scheduled probable cause hearing, the identification procedure, if considered to be such, was not pre-arranged by Fournier, as it was in Martin v. Donnelly, supra.

I find that even if defendant's counsel was present when Jaime identified the defendant in the courtroom, I fail to see what protection his presence would have afforded the defendant. Fournier did not act improperly not did he impermissibly suggest to Jaime the defendant's identification when he saw both in the courtroom on May 2, 1980. Nothing was done to give rise to a very substantial likelihood of irreparable misidentification by Jaime.

Based upon its findings of fact, rulings of law and analysis of the

evidence presented, after a re-hearing, the defendant's Motion to Suppress is DENIED.

By the Court,

_____
Herbert Abrams
Justice of the
Superior Court

Dated: March 18, 1981

Entered:

Office - Supreme Court, U.S.
FILED
NOV 5 1984
ALEXANDER L. STEVAS,
CLERK

(2)

NO. 84-565

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

COMMONWEALTH OF MASSACHUSETTS,
Petitioner.

V.

PAUL DONOVAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

BRIEF OF THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the holding of this Court in Moore v. Illinois, 434 U.S. 220 (1977), should be overruled.

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BRIEF OF THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The respondent is not dissatisfied with the petitioner's citation of the opinions below.

JURISDICTION

The respondent is not dissatisfied with the petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISION INVOLVED

The respondent is not dissatisfied with the petitioner's statement of the constitutional provision involved.

STATEMENT OF THE CASE

The respondent relies on the facts set forth in the opinion of the Massachusetts Supreme Judicial Court in Commonwealth v. Donovan, 392 Mass. 647, 467 N.E.2d 198 (1984), which appears as Appendix A to the petition for a writ of certiorari.

REASONS FOR NOT GRANTING THE WRIT

THIS CASE IS ENTIRELY CONTROLLED BY THE HOLDING OF THIS COURT IN MOORE V. ILLINOIS, AND NO REASON HAS BEEN SHOWN BY THE PETITIONER AS TO WHY CERTIORARI SHOULD BE GRANTED TO REVIEW IT.

In Moore v. Illinois, 434 U.S. 220 (1977), this Court declared the "strict rule" (id. at 232) that, in a criminal trial, the prosecution cannot buttress its case-in-chief by making use of testimony as to a pretrial identification made in violation of the accused's Sixth Amendment rights. Id. at 231. Such a violation of the Sixth Amendment occurs when a corporeal identification procedure is conducted after the initiation of adversary judicial criminal proceedings and in the absence of the accused's counsel. Ibid.

In the case at bar, after the commencement of adversary judicial criminal proceedings against Paul Donovan, and

without advising Donovan's counsel, the investigating police officer obtained a pretrial identification of Donovan as the perpetrator of the assault charged against him from Pablo Jaime, who was one of the witnesses to the assault. At trial, despite Donovan's timely Sixth Amendment challenge to the introduction of evidence of this uncounselled pretrial identification (motion hearing transcript, vol. 2, p. 71; Record Appendix, pp. 18-19), both Jaime and the investigating officer testified to it before the jury. See Commonwealth v. Donovan, 392 Mass. 647, 648, 467 N.E.2d 198, 199 (1984). The case is entirely controlled by Moore v. Illinois, supra, and the Massachusetts Supreme Judicial Court correctly so held. See Donovan, 392 Mass. at 649-651, 467 N.E.2d at 200-201.

The petitioner has shown no reason

why certiorari should be granted in this case. It has made no showing that the Massachusetts Supreme Judicial Court decided the federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals; nor has it shown that the Massachusetts Supreme Judicial Court decided a question of federal law which has not been settled by this Court or decided the federal question in a way in conflict with applicable decisions of this Court. See Supreme Court Rule 17.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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